HISTORY OF REGULATORY STREAM

In the year 1961 Leonard Christensen, as President of Otter Creek Reservoir Company and representing what are commonly called the "A to L Users" thus named because they are the companies listed under sub-paragraphs (a) through (l) and whose rights are defined at pp. 2-6 of the Progress Printing Edition of the Sevier River Decree (hereinafter "A to L"), wrote the State Engineer stating that the co-operators ("DMAD") of the Sevier Bridge Reservoir storing water during the period October 1st through March 31st wanted a hearing or an opinion from the State Engineer, then Wayne D. Criddle, on the ability of A to L to take credit for waters passing Vermillion Dam between April 1st and September 30th of each year.

Mr. Christensen's letter stated that A to L had enjoyed a storage right which was undisputed ever since the Cox Decree was entered in 1936.

My information is that at the 1957 meeting of the Sevier Water Users Association held at the Telluride Power office in Richfield W. C. Cole, the Lower Sevier River Commissioner, questioned the practice and a substantial dispute arose about the interpretation of pages 3 through 6 compared with page 194 of the Cox Decree.

In 1959 (and in other years when appropriate) Water Commissioner Keith Christensen had given A to L "hold-over credits" for water which A to L did not use but by-passed and allowed to cross Vermillion Dam.

A hearing was held before the State Engineer on May 22, 1961 at which no conclusion was reached but Mr. Criddle gave the parties until June 30, 1961 to present evidence of their respective positions and arguments.

On July 31, 1961 the State Engineer ruled (copy attached) adverse to A to L.

On September 28, 1961 the A to L Users filed suit against DMAD Companies to review that Ruling.

In the meantime A to L filed an Exchange Application asking that the waters of Clear Creek and other tributaries below the Piute Reservoir be exchanged for waters held in the Piute Reservoir. That application was provisionally denied on the protest of DMAD.

On February 7, 1964 the State Engineer acted on the application in which he partially granted the application but only to the extent that A to L's practices demonstrated no stream depletion resulting from those practices. The A to L Users amended their Complaint to assert that they had the unlimited right to store all waters described at pp. 2-4 of the Sevier River Decree ("Decree").

The pending action was, by Stipulation of all parties, broadened to include an appeal from the February 7, 1964 Decision of the State Engineer.

In August 1962 Judge A. H. Ellett was appointed to hear the case because of disqualification of Ferdinand Erickson, Sixth District Judge, who had previously represented A to L.

The following is an excerpt from correspondence from Edward Clyde whom A to L associated to me:

> If we have in fact in the past been making this exchange, then it seems to me that this decision approves our right to continue to make it and as to that situation we are confronted only by a fact question as to what our past practice has been. If we are going to take that matter to court, it should be for a declaratory judgment which would decide the amount of water which we have heretofore utilized by exchange or otherwise under our rights. If we were to succeed in showing that we have heretofore been making the exchange, then the decision is completely in our favor, and we have no reason to appeal it.
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> If, however, the court should find that we have not been making the exchange in the past, then the decision denies our right to make it in the future, and as to it, I think we should want to appeal, because we interpret the Cox Decree as granting to us the right to store the water and the exchange application would permit us to use this decreed right by exchange.
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> Thus, if we are going to go to court, it seems to me that our complaint would have to have at least two counts. The first would urge the court to determine what the past practice has been and in particular to adjudicate that we have heretofore used the water by exchange, and exchange exactly as we contend. This would raise only a single fact issue as to past usage.
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> The second count of the complaint would be really in the alternative--that is, that if the court ruled on the first count that we have not been making the exchange, and, therefore, could not under the approved application use the water as we want to in the future, then we would contend that the State Engineer is in error in his construction of the decree.
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> The approval of the change application would give us everything we want if the court would

> find as a matter of fact that we have been making the exchange as we contend that we have.
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> If, however, the court finds that no exchange has been made in the past, then the decision would deny our right to make it in the future, and under our theory of the matter, this would be erroneous. This is so, because we contend that the Cox Decree gives us the right to store any and all water, and that this storage could be accomplished by building new storage at this time, or it could be done by storing the water under an exchange arrangement, and we contend that we have the right to do this, even if it had never been done in the past. It is this phase of the matter as to which I think an appeal must be taken. If you concur, why don't you start preparing the pleadings.

In 1967 we began the first serious negotiations for a settlement and on March 13, 1968 I forwarded the stipulation to Thorpe Waddingham, a copy of which is annexed. On March 17th I received a reply from Thorpe Waddingham, a copy of which is enclosed. On May 16, 1968 I sent to Thorpe Waddingham original and five copies of the stipulation and on June 12, 1968 received a letter from Thorpe Waddingham stating that he had the stipulation, would circulate it for signatures of Sam Cline and the State Engineer and would return it to us. On January 5, 1976 I sent another letter to Thorpe Waddingham, sending him the stipulation in precisely the form as it appears in the 1968 yearbook at page 9 through 19.

Since that time the Agreement has been implemented by allowing a "Regulatory Stream". In the dry year of 1977 all parties allowed A to L holdover credits for regulatory stream "spill-overs" across Vermillion Dam.

At all times both River Commissioners have stated that a regulatory stream was "only good sense" and a practical means of administering the river.

A to L can, as great inconvenience but nevertheless effectively, use all the waters by strict application of the Decree but it would be wasteful, difficult to accommodate, and would be only a way of making irrigation practices of the A to L Users harder to exercise, a sort of "dog-in-the-manger" posture.

Ken Chamberlain